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In the Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 439, 440

UNIVERSAL OIL PRODUCTS COMPANY, *Petitioner*,

v.

ROOT REFINING COMPANY, ET AL.

On Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION[1]

OPINION BELOW

The opinion of the Court of Appeals for the

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[1] The United States, although designated as *amicus curiae*, was more than merely *amicus* in these cases. The court below authorized the appearance of the United States as *amicus* by its order of June 20, 1947, in accordance with this Court's comment in its prior opinion in these cases (328 U. S. 575, 581) that "a federal court can always call in law officers of the U. S. to serve as *amici*." In the court below, the Department of Justice was charged with the duty of presenting "the available evidence bearing upon the charges, whether or not it supports the charges, to the end that the truth may be ascertained." (App. to Pet. p. xii). See *infra*, p. 8.

Third Circuit (Op. 1-41)[2] is reported at 169 F. 2d 514.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered July 6, 1948 (App. to Pet. xiv). The time for filing petition for writs of certiorari was extended on September 9, 1948, by Justice Burton to and including December 1, 1948. The petition for writs of certiorari was filed on December 1, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in the exercise of its inherent power to protect the integrity of its judgments, a court of appeals has jurisdiction, notwithstanding the losing party's refusal to participate and the expiration or subsequent invalidation of the patents involved (a) to institute an inquiry into whether its judgments had been procured by fraud, (b) to hear the evidence, and (c) upon finding that the judgments

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[2] The pertinent record in these cases consists of more than 2,500 typewritten pages of testimony and over 300 exhibits, containing approximately 1,000 additional pages. Simultaneously with its petition, petitioner has filed a motion to dispense with the printing of the entire record for the purpose of the petition for writs of certiorari. The Government does not oppose the motion for the purposes of the petition. It is, however, filing herewith for the Court's convenience printed copies of the opinion below, in which the court dealt with these cases along with *American Safety Table Co.* v. *Singer Sewing Machine Co.*, a companion case also pending on petition for writ of certiorari (No. 441, this Term). Opinion references will appear as (Op. —) with the appropriate page number inserted.

were so tainted, to direct their vacation and the dismissal of the complaints.

2. Whether the evidence here supported the court's findings that the petitioner, Universal Oil Products Company, employed Morgan S. Kaufman improperly to influence the actions of Judge J. Warren Davis, formerly a judge of the Circuit Court of Appeals for the Third Circuit, in these cases, and that Judge Davis was so influenced.

STATEMENT

The instant petition for writs of certiorari seeks to bring these cases before this Court for the third time. *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575; *Universal Oil Products Co.* v. *Root Refining Co.*, Nos. 352-353, Nos. 102-103 Misc., October Term, 1947, denied 332 U. S. 813.

In 1929 and 1931, Universal Oil Products Company (Universal) brought suits for patent infringement against the Root Refining Company (Root). The suits were consolidated and the patents held valid and infringed. 6 F. Supp. 763. The Circuit of Appeals for the Third Circuit, affirmed on June 26, 1935, in an opinion written by Judge J. Warren Davis (78 F. 2d 991), and this Court denied certiorari, 296 U. S. 626. In 1939, Universal and Root arrived at an agreement settling their controversy.[3]

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[3] On July 28, 1944, Universal and Root entered a further settlement agreement. (Nos. 352-353, October Term, 1947, R. 170).

On June 5, 1941, the attorneys who had represented Root and were then representing other oil companies against which petitioner had instituted similar infringement suits on the basis of the *Root* decree, suggested to the Circuit Court of Appeals for the Third Circuit that the testimony taken at Judge Davis' trial [4] pointed to his bribery by one Morgan S. Kaufman to obtain a decision favorable to Universal in the *Root* appeal and urged the court to inquire into the matter. At the suggestion of these attorneys, who had been appointed *amici curiae*, the court appointed a master to inquire into the circumstances surrounding the *Root* decree. The master held extensive hearings, which, however, were not governed by the customary rules of trial procedure.[5] At the conclusion of the hearing, he submitted a report concluding that the *Root* decrees were tainted and invalidated by fraud. The court similarly concluded, relying in part on this report, that the decrees were so tainted and by order dated

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[4] Judge Davis and Kaufman were tried in the District Court for the Eastern District of Pennsylvania in 1941 on an indictment charging obstruction of justice in regard to The Fox bankruptcy matters. See *infra* p. 26 fn. 28. The trial resulted in a disagreement of the jury. A second trial similarly resulted in a jury disagreement.

[5] The master examined records in the possession of the United States Attorney for the Southern District of New York, the records of proceedings before the Philadelphia grand jury, bank records and various statements of interested parties. From these materials he selected those documents which he deemed appropriate for the submission to the inspection of the *amici* and counsel for Universal.

June 15, 1944, directed that the judgments be vacated and the cases reargued. 62 U. S. P. Q. 114.[6] Subsequently, on December 29, 1944, the court awarded the master fees of $25,000 and at the *amici's* request, awarded them $54,606.57 as expenses and $100,000 as reasonable compensation. 147 F. 2d 259. On review, this Court set aside that part of the order of December 29 dealing with the *amici* as invalid on the ground, among others, that the order of June 15, 1944, upon which this order was based, deprived Universal of its judgments without proper hearings.[7] 328 U. S. 575.

On June 20, 1946, the court below invited suggestions from petitioners and the then *amici* as to the "present status of the appeals" in the *Root* case, "now that the petitions for writ of certiorari have been disposed of by the Supreme Court" (R. 3, Nos. 352-353, October Term, 1947). After the filing of briefs and oral hearing on the suggestions there submitted (R. 5-21, Nos. 352-353), the court on June 20, 1947, vacated its order of June 15, 1944, which had in turn vacated its original judgment of June 26, 1935, and directed Universal to show cause why

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[6] No effort was made to secure review of this order.

[7] The Court simultaneously dismissed the writ of certiorari invoked under Judicial Code 262, in which petitioners had questioned the jurisdiction of the court to enter the order because of the alleged absence of a justiciable controversy. 328 U. S. at 581. A petition for rehearing alleging ambiguity in the court's opinion was denied on October 14, 1946. 329 U. S. 823.

the original judgment should not be set aside by reason of alleged fraud.[8] (R. 174-177, Nos. 352-353). Universal's petitions and motions, seeking review of this order (Nos. 352-353, Nos. 102-103 Misc., October Term 1947) were denied. 332 U. S. 813.

Thereafter, the Senior Judge of the Third Circuit on December 26, 1947, certified to the Chief Justice in the language of 28 U. S. C. (1946 ed.) 17 a(b) (now 28 U. S. C. 291) that the judges of that court were unable to proceed in these cases. Chief Justice Vinson, on January 16, 1948, specially designated Judge Soper of the Fourth Circuit, Judge Mahoney of the First Circuit and Justice Prettyman of the Court of Appeals for the District of Columbia to act as circuit judges in the Third Circuit and discharge all the duties of circuit judges thereof in connection with these cases.

At a conference called by the specially designated judges on January 22, 1948, to discuss the posture of the cases, the attorneys were instructed to define what they understood to be the issues and merits as well as the questions of law involved (Op. 8). On February 10, 1948, Universal made return to the June 20, 1947, order to show cause and moved that it be dismissed on the ground that no justici-

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[8]The order further authorized the appearance of the Attorney General or members of the staff of the Department of Justice, as *amicus curiae*. Appearances of Department of Justice attorneys were thereafter entered (R. 180-181, Nos. 352-353), and the appearances of the former *amici* were withdrawn (R. 178-179, Nos. 352-353).

able controversy existed (Op. 8). On March 2, 1948, the Government filed a "Statement of Ultimate Facts" and charges of fraud, to which Universal filed a reply in opposition and a motion to strike (Op. 9). A hearing on these questions was held on March 23, 1948 (Op. 8). At this hearing the Court's proposed order, subsequently issued on April 6, 1948, was also read to enable counsel to object and criticize the provisions thereof.

On April 6, 1948, the court denied Universal's motions to dismiss the proceedings and to strike the Government's statement of ultimate facts.[9] The court ordered that in view of conclusions of the special master and the allegations of wrongdoing set forth by the United States, it deemed it necessary to determine whether Judge Davis was improperly influenced as a member of the court by hope of gain or reward and whether the judgment of the court was secured by fraud or wrongdoing of Universal or any one acting on Universal's behalf.[10] (Op.

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[9] The court also allowed William Whitman Company to intervene, and further granted the motion to withdraw of Skelly Oil Company, which had been allowed to intervene by the order of June 20, 1947 (*supra*, p. 5).

[10] The court formulated the charges which had been made by the Government and Whitman and which were to be tried as follows (Op. 9-10):

"(a) Whether Judge J. Warren Davis' action in these cases was influenced by the expectation of gain or favors pursuant to an agreement or understanding to that effect with Morgan S. Kaufman.

"(b) Whether certain transactions effected in the latter part of 1935, whereby Morgan S. Kaufman advanced the sum of

9-10.) Universal's motions and answers were accepted as a general denial of all allegations of wrongdoing. Trial of the cases was set for hearing without intervention of a master on May 10, 1948, and continuously thereafter until completed. The United States was charged at the trial with "the duty to present to the court the available evidence bearing upon the charges, whether or not in support thereof, to the end that the truth might be ascertained." All parties, including Universal, were to be given full opportunity to present evidence bearing on the charges and to participate in the examination and cross examination of witnesses and in the argument before the court "so that the customary procedure of an adversary proceeding might be observed." (Op. 10.) The trial was consolidated with that in *American Safety Table Co.* v. *Singer Sewing Machine Co.* as elsewhere de-

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$10,000 to one Charles Stokley, a cousin of Judge Davis, were the means whereby Judge Davis was compensated in whole or in part for his decision favorable to Universal Oil Products Company in these cases, and whether certain other transactions between Judge Davis and Morgan S. Kaufman during the period 1935 to 1938 allegedly relating to the litigation evolving from the bankruptcy of one William Fox, were part of a corrupt and illicit combination between Judge Davis and Kaufman to obstruct justice.

"(c) Whether Morgan S. Kaufman was employed or retained by Universal Oil Products Company in connection with these cases and, if so whether the purpose of such employment or retainer was the expectation of Universal Oil Products Company that Kaufman would exercise or endeavor to exercise an improper influence upon Judge Davis in order to secure favorable judicial action by him in connection with these cases."

scribed (Br. of the United States in Opp. No. 441 this Term p. 5) (Op. 11).

The hearings took place in accordance with the terms of the order of April 6. The evidence was presented by United States as *amicus*. Full opportunity was accorded and availed of by Universal to examine and cross examine witnesses offered by the United States, and to offer witnesses on its own behalf. At the conclusion of the evidence, the cases were adjourned for a week for the preparation of arguments, which were heard without restriction as to time. (Op. 11). The court thereafter on July 6, 1948, issued its findings and opinion based on the evidence introduced at these hearings. The court found that Universal had retained Kaufman for the purpose of improperly influencing Davis' actions in these cases; that Davis' actions in these cases were improperly influenced by Kaufman, and that the so-called Stokley transactions, whereby Kaufman loaned money to Davis' cousin, Stokley, but Stokley paid the interest thereon to Davis, were the means by which Davis was compensated at least in part for his decisions. Accordingly, since the court also rejected Universal's contention that it was without jurisdiction to proceed in these cases, it ordered that the records of the courts be purged; that the original judgment in Universal's favor, both in that court and in the District Court be vacated and that the suits by Universal finally be dismissed by reason of the fraud practiced on the court (Op. 40-41).

ARGUMENT

In its prior opinion in these cases (328 U. S. 575), this Court indicated that the court below's order of June 15, 1944, directing the vacation of its original judgments was probably invalid since entered without according Universal the usual safeguards of an adversary proceeding. Accordingly, the court below vacated its order on June 15, 1944, and itself conducted another hearing. As a result of this hearing, that court again concluded that the original judgments were tainted by fraud, and hence directed their vacation and the dismissal of Universal's complaints for fraud. As to these proceedings, the usual safeguards of an adversary proceeding were fully observed.

The primary questions raised by Universal's petition here are factual in nature, although the various aspects of the court's findings of fact are only specified as error without discussion. The alleged jurisdictional infirmities in the proceedings below, which Universal's petition stresses,[11] have already been passed on and rejected as unsound by this Court in *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, and in its prior opinion in these cases (328 U. S. 575). See, also, this Court's denial of review in *Universal Oil Co.* v. *Root Refining Co.*, 332 U. S. 813. As to the factual questions, the find-

[11] Universal also questions the propriety of the court's action in permitting Whitman to intervene. The Government takes no position on this issue.

ings were made by a court comprised of judges who do not normally sit in the Third Circuit and who were specially designated by the Chief Justice to act in these cases. The findings are supported by ample evidence and are corroborated by the conclusions of the master and of the regular members of the Third Circuit, sitting *en banc,* which conclusions provided the basis for the court's order of June 15, 1944, in which it vacated its original judgments of June 26, 1935. There is, accordingly, no reason for this Court to review factual questions which of themselves do not warrant certiorari.

1. *Jurisdictional Contentions*: (a) Petitioner stresses at great length (Pet. pp. 44-60) that since Root, the named defendant, did not participate in these proceedings and the patents involved have expired or been held invalid (*Univrsal Oil Co.* v. *Globe Co.*, 322 U. S. 471), there was an absence of both adverse parties and a private controversy necessary for a "case or controversy" in the classical sense and hence that the court below was without jurisdiction to proceed in these cases. This contention has been urged upon this Court without success by petitioner in each of the two previous proceedings in these cases.

That contention was passed upon and rejected by this Court in its opinion in 328 U. S. It was the ground on which Universal sought review of the order allowing the expenses of the then *amici* under a writ of certiorari under Judicial Code 262. Al-

though that writ was initially granted (324 U. S. 839), the Court after further consideration dismissed the writ, while reversing the cause under the writ of certiorari invoked under Judicial Code 240 (a). 328 U. S. 575 at 581. The dismissal of the writ of certiorari under Judicial Code 262, viewed in light of the Court's statement that the inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question" (328 U. S. at 580), makes the rejection of this contention crystal clear. The citation of *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, in support of this statement serves further to demonstrate the unsoundness of Universal's position; in the *Hazel-Atlas* case, this Court pointed out (p. 246):

> This matter does not concern only private parties. There are issues of great moment to the public in a patent suit * * *. Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an inquiry to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they

must always be mute and helpless victims of deception and fraud.

The same ground was the basis of Universal's subsequent effort by petitions for writs of certiorari under Judicial Code 262 and 240(a) and by motions for leave to file petitions for writs of mandamus or prohibition, to obtain review of the court's order of June 20, 1947, directing it to show cause why the original judgment should not be set aside for fraud. See, *e. g.*, Petition in No. 352-353, October Term, 1947, pp. 26-31. And although the Government there urged this Court to review the order if there were any question of the court's jurisdiction to proceed (Memorandum for United States as *amicus curiae*, in Nos. 352-353, October Term, 1947, pp. 11-12), this Court denied Universal's petitions and motions. 332 U. S. 813.

(b) Universal's contention that since the court below was an appellate court, it was without power itself to hear the evidence bearing on the fraud perpetrated upon it (Pet. pp. 36-44),[12] is likewise disposed of by the *Hazel-Atlas* case and this Court's prior opinion in 328 U. S. In the *Hazel-Atlas* case, it was held that the court of appeals there involved had the power itself to act in the premises. 322 U. S. at 249. Although in that case the evidence was

[12] It is to be noted that in the court below, petitioners did not object to this procedure when proposed by the court. See Hearing of March 23, 1948, before court below, p. 129, *supra* p. 7.

undisputed and was before the court on Hartford's sworn admissions, the Court's notation that it need not decide whether, if the facts were in dispute, the court of appeals "*should* have held hearings and decided the case or should have sent it to the District Court for decision" (italics supplied) (322 U. S. at 249-250, fn. 5) clearly indicates that even in such circumstances the court of appeals had the power to hold hearings, and whether, in fact, it should exercise that power in a particular case depended on the circumstances. See, also, the dissenting opinion of Mr. Justice Roberts (322 U. S. at 254). Similarly, in the prior proceedings in these cases, this Court, although it set aside the award of *amici's* expenses, did not upset the expenses of the master whom the court below had appointed as its agent to hear the evidence and submit a report, which the court adopted. Implicit in this approval of the master's expenses is the proposition that the court had power to appoint a master to hear the evidence,[13] and it follows that since the court could only delegate power which it had, the court itself could have heard the evidence.[14] Cf. *National Labor Relations Board* v.

[13] Universal's participation in the proceeding before the master with the knowledge that his expenses would be assessed by the court was, of course, insufficient alone to vest jurisdiction in the court to appoint a master.

[14] This conclusion is buttressed by the Court's comment: "The power to unearth * * * fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation." (328 U. S. at 580).

Rath Packing Co., 123 F. 2d 684 (C. C. A. 8). Thus, both the *Hazel-Atlas* case and this Court's prior opinion in 328 U. S. affirm the power of the court below, although an appellate court, itself to hear the evidence where the fraud alleged was practiced on it. See, also, *Art Metal Works* v. *Abraham & Straus*, 107 F. 2d 940 (C. C. A. 2); *id.*, 107 F. 2d 944 (C. C. A. 2), certiorari denied, 308 U. S. 621.[15]

(c) The *Hazel-Atlas* case not merely affirms, contrary to petitioner's contention (Pet. pp. 62-63), the power of a court of appeals, when fraud has been perpetrated upon it, to direct the district court to vacate the judgments and dismiss the complaints, but at least inferentially requires that such action be taken. In that case, the fraud which consisted of the publication of an article commendatory of the patent and purported to be written by a

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[15] Although it does not deny that it was accorded the "usual safeguards of an adversary proceeding" at the hearings, petitioner does claim that the proceeding generally resulted in a deprivation of its property without due process of law (Pet. pp. 63-65). The record, however, reveals that petitioner was accorded procedural due process, although such protection was provided by "improvised and rough and ready substitutes for the usual and regular procedure of the courts" (Pet. pp. 64-65); petitioner was notified of the charges and it was afforded opportunities to to make motions addressed thereto, which it fully exploited (see *supra*, pp. 5-9). It is interesting to note that petitioner, at this point, urges that due process includes the right to an appellate review (Pet. p. 64) although elsewhere it concedes that such reviews are a matter of grace and not required by due process (Pet. pp. 32-36).

disinterested person, was held to call "for nothing less than a complete denial of relief to Hartford for the claimed infringement of the patent thereby procured and enforced." 322 U. S. at 250;[16] see, also, *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240; *Precision Instrument Co.* v. *Automotive Co.*, 324 U. S. 806; *Mas* v. *Coca-Cola Co.*, 163 F. 2d 505 (C. C. A. 4). As the court below commented, "How much more deserving of condemnation is the conduct of the patentee in the instant case which was directed against the integrity of the court itself" (Op. 40).

2. *Factual Questions*: The factual questions raised by Universal do not warrant an exception from the usual rule against granting certiorari to review matters of fact. The findings here that Universal employed Kaufman for the purpose of improperly influencing Davis' actions and that Davis was so influenced are supported by ample evidence, see *infra* pp. 17-26. These findings were made by an unanimous court composed of three judges who normally do not sit in the Third Circuit, who were specially designated by the Chief Justice to act in these cases, and who themselves heard the testimony and observed the demeanor of the witnesses in the course of direct and cross examination. Cf. Rule 52(a) of the Federal Rules of

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[16] The Court went on: "To grant full protection to the public against a patent obtained by fraud, the patent must be vacated" (322 U. S. at 251).

Civil Procedure. Moreover, these findings, independently arrived at by the court below on the basis of the evidence introduced at the hearings, are in harmony with the conclusions of the regular members of the Third Circuit, sitting *en banc*. Although the order based on the master's report has since been vacated, the report itself as an inquiry into whether the judgments were tainted by fraud and corruption has not been set aside.

That the ultimate findings of the court below are supported by ample evidence is, we submit, clear from the court's findings of subsidiary facts.[17] Since most of the facts are undisputed, the primary area of possible dispute lies in the inferences and conclusions to be drawn from these basic facts, and as to these, the unanimous reasoning of the court below by which these conclusions were reached is, we submit, patently sound.

(a) *Universal's Employment of Kaufman*: The court's finding that Universal employed Kaufman in order that he might influence Judge Davis improperly in these cases may be summarized as follows: Frank L. Belknap, who had charge of Universal's legal staff in the United States, sought in 1932, according to Kaufman, an appointment with

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[17] It is to be noted that the events here involved occurred in 1935, 13 years prior to the hearings below. By that time, many of the important participants, such as Judge Haight and Mr. Belknap, had died.

Kaufman (Op. 23),[18] who for many years prior to the *Root* cases had been a close associate of Judge Davis (Op. 21),[19] and retained him as an additional member of its very competent and adequate staff of lawyers in the *Root* cases (Op. 23).[20] These cases were test cases, and were of the greatest impor-

[18] Kaufman lived in Scranton, Pennsylvania, where he maintained a law office since 1905. He had served as a referee in bankruptcy from 1913 to 1934, and in the period from 1909 to 1939, he was attorney of record in 17 cases in the Court of Appeals. In 1933, when he was appointed receiver in bankruptcy in S. W. Strauss Company, he moved to NewYork City where Strauss' business had been conducted and from then until after 1940, his main occupation, apart from the receivership, was buying and selling securities on the stock market. (Op. 23.)

[19] The association included Judge Buffington and Kaufman's brother, David. The four men visited in each other's houses and offices and spent all or part of February with each other at the same resort in Miami, Florida, in 1935, 1936, and 1937. Their intimacy was well known in legal circles in the Third Circuit.

[20] The staff consisted of former Judge Thomas G. Haight, of Jersey City, former Judge Hugh M. Morris, and Eugene E. Berl, of Wilmington, Delaware, and William F. Hall and Charles S. Thomas, of Washington, D. C. Each lawyer was well qualified for the part he was employed to play. Judge Haight was an eminent and successful patent lawyer, especially in the Third Circuit, and took the lead in the preparation and trial of these cases in both the District Court and the Court of Appeals. Judge Morris was an experienced patent lawyer and actively participated in the preparation and trial of these cases in the District Court. Mr. Berl acted as local attorney and was in a position to furnish all the assistance needed by Universal at the seat of the District Court. Mr. Hall was very active in the litigation and argued the cases in both courts, confining his argument to the scientific aspects of the issues of validity and infringement. Mr. Thomas also participated in the trial of the cases in the District Court and in the prepara-

tance to Universal. An adverse decision of the Third Circuit would have destroyed the lucrative licensing system, which Universal was establishing.[21] (Op. 21.) At that time, neither the character of the service nor the fee to be paid was fixed, but it was understood that Kaufman was not to accept employment from other oil companies (Op. 23). When Belknap told Hiram J. Halle, Universal's president, of Kaufman's retention in May 1933, Halle agreed to Kaufman's retention but made no arrangement with him either as to services or fee.[22] The first time that Kaufman approached Halle in person was on April 15, 1935, after the *Root* cases had been argued in the Court of Appeals and were pending decision. (Op. 24.)

Apparently the reason why there were no arrangements made with Kaufman as to the services he was to perform was that there was no need at that time or later for Kaufman's services in these cases or "indeed for any legitimate service that he was competent to render" (Op. 23). Kaufman did not live in Delaware and could not efficiently perform the work of local counsel. He had neither the

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tion of briefs for the Court of Appeals. None of these lawyers knew Kaufman, except Haight, who had been introduced to him by Judge Davis at a lawyers' dinner in New York in 1930 and 1931. (Op. 21-23.)

[21] After the case was won, Universal sent copies of the opinion to prospective licensees and large sums were paid to Universal in settlement of past infringements (Op. 21).

[22] There is no correspondence or documentary evidence relating to Kaufman's employment by Belknap or Halle.

training nor the experience or ability to understand or present the difficult scientific questions or the legal questions which the *Root* cases involved. Upon his appointment as receiver in bankruptcy in the S. W. Strauss Company in 1933, Kaufman devoted his time, apart from the receivership, to the buying and selling securities on the stock market. As a matter of fact, he rendered no service whatsoever to Universal in these cases from the beginning to the end of the litigation. He had no contact with any of the other lawyers except for two casual inquiries by him as to the progress of the litigation and for a conference just before argument in the Court of Appeals, when it was decided not to put his name on the brief. (Op. 23-24.)

Despite his failure to perform any services, Kaufman was paid $30,000 by Universal in connection with these cases (Op. 24). After Judge Davis' opinion in Universal's favor was filed on June 26, 1935, Kaufman called upon Halle, Universal's president, and asked for a fee of $35,000 on the basis of $10,000 a year for the three and one-half years which had elapsed since Belknap had retained him. Halle suggested $25,000, contingent upon denial of Root's petition for certiorari. A check for this amount was delivered to Kaufman in Universal's New York office on October 22, 1935, the day after this Court denied certiorari (296 U. S. 626). This payment was supplemented by an additional $5,000 on July 27, 1936, when Kaufman asked Halle to restore the $10,000 cut from his

original demand. (Op. 25-26.) In contrast to this fee of $30,000 paid to Kaufman, who had rendered no legal services in the cases,[23] the following fees were paid to the lawyers who actually did the work: Haight, $86,300; Hall, $54,712; Thomas, $24,143; Morris, $12,708 and Berl, $1,073 (Op. 26).

All the evidence which we have just partially summarized is clearly ample, we submit, to support the court's conclusion that "Kaufman was employed or retained by Universal for the purpose and with the expectation that he would exercise upon Judge Davis an improper influence in order to secure favorable judicial action in the *Root* cases. There is no other reasonable explanation for the relationship or for the large fees that were paid him. He possessed nothing of value to offer Universal, except his intimacy with the members of the court. All phases of the litigation were in the hands

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[23] Kaufman also received additional fees of $20,000 from Universal in 1936. Ten thousand dollars was paid on March 18, 1936, after Kaufman had been consulted in regard to the proper district in the Third Circuit in which a suit against the Doherty interest should be brought, and had betrayed ignorance of the well known rules of venue in patent cases. In that case, Kaufman served as local counsel, filed a complaint and various motions but did not prepare them. In the same case, Haight was paid $3,000, Hall $75, and Morris and Thomas $2,500 each. The additional $10,000 was paid on December 3, 1936, representing, as explained by Universal, Kaufman's 1937 retainer paid in advance, pursuant to Kaufman's request because he expected large stock profits in 1937. At the time, Halle, Universal's president, told Kaufman that this was the last retainer that Universal would pay. Thus a total of $50,000 in all between October 22, 1935 and December 31, 1936, was paid Kaufman by Universal. (Op. 26-27.)

of able lawyers and Kaufman was incompetent to assist them in any legitimate way even if he had tried to do so. In fact, he made no lawful contribution whatsoever." (Op. 28.)[24]

(b) *Kaufman's payments to Davis*: Universal's purpose in retaining Kaufman, that he should improperly influence Davis, was achieved, the court found, by Kaufman's payments to Davis through the indirect means afforded by the so-called Stokley transactions. As to these, the court found: In February, 1935, shortly after the argument but before the decision in the *Root* cases, while both Davis and Kaufman were in Florida, Davis learned that his cousin C. L. Stokley, a grower of citrus fruit, was threatened with loss of certain property through foreclosure proceedings instituted by the local authorities on account of a $29,000 paving assessment. At that time he promised Stokley to try to secure a loan for him from a friend. After his return to Philadelphia, Davis entered into active correspondence with Stokley and the municipal authorities as

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[24] The court rejected as "frivolous" Universal's explanation of the $25,000 payment as being made to avoid a law suit for fees, such as those brought by former Senator James Reed of Missouri and W. P. German, each for a million dollars, for, the court pointed out, he was without shadow of any claim or any qualification for the work. Moreover, he was kept on the payroll and given an additional $25,000 without rendering any substantial legal service. It also considered "idle" the suggestion that Universal had retained Kaufman to prevent his employment by a competitor, for he had nothing to offer an adversary other than the illicit influence which Universal had secured for itself. (Op. 27-28.)

to the acceptance of a smaller amount to compromise the assessment, but it was not until October 4, 1935, that Davis wired the town that $10,000, the sum which the town had agreed to accept, had been definitely promised.[25] On October 24, 1935, two days after Kaufman had been paid by Universal (*supra*, p. 20), Davis arranged a meeting in his office between Kaufman and Stokley who then met for the first time. Pursuant to the agreement between them there drawn, whereby Kaufman agreed to loan $10,000 to Stokley at 8% per annum and Stokley agreed to make certain conveyances of property as security, a check for $10,000[26] was thereafter delivered to Stokley and deeds for the property received and sent to Kaufman. (Op. 29).

During this period and thereafter until the Government's investigation into Davis' affairs, Kaufman evinced no interest at all in the transaction other than to enter the agreement and advance the money. Ordinarily, Kaufman was persistent in pressing defaulting creditors for payment, but here he took no action although the agreement called for annual payments of $2,500 and Stokley made

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[25] The undisputed evidence shows that beginning June 1935, Stokley wrote frantic letters to Davis, begging for a loan as soon as possible; that Davis at least as early as August 1935 had asked Kaufman to make the loan, and that during all of this time, Kaufman, had on deposit in various banks over $100,000 which was uncommitted. (Ex. 109; tr. 2271.)

[26] The check was drawn on the account in which Kaufman had deposited the $25,000 he had just received from Universal. That account prior to this deposit contained only $5,568.68 (Ex. 91; tr. 2271).

no payments either of principal or interest to him until the summer of 1939. This payment was made after the Government's investigation of Davis had been started, and after Kaufman and Stokley had dined together at Davis' house in Trenton in 1939. Kaufman claimed he wrote Stokley many times before 1939, but none of the letters were produced and Kaufman's secretary, who kept his books, testified she never heard of Stokley before he made a payment of $600 on the loan on June 18, 1939. Kaufman produced two letters from Stokley dated April 7, 1937, and May 11, 1938, referring to the $10,000 loan and his difficulties in making payment. Unlike all other letters produced by Kaufman, these were written in lead pencil and were not accompanied by envelopes in which they were mailed. (Op. 32.)

In contrast, the court went on to point out that Davis' records show that Stokley paid Davis $200 on June 22, 1936, $200 on July 7, 1936, and $400 in February, 1937. Davis testified this was paid on account of the principal of another loan, a $4,000 loan, which he had made to Stokley;[27] the court, however, found that these sums were payments on

[27] After the $10,000 loan from Kaufman to Stokley, Stokley was threatened with foreclosure of certain of his orange groves on account of another debt which he owed and for which he needed $4,000. Davis, himself insolvent at the time as a result of stock speculations which came to a disastrous end in the financial crash of 1929, borrowed the money from Samuel Ungerleider, a New York broker who was his friend. He loaned it to Stokley at 8% per annum for which he took certain deeds

account of interest on the $10,000 loan. These payments, it pointed out, correspond in amount to overdue semi-annual payments of interest on $10,000 at 8%. They could not have been interest payments on the $4,000 loan, since the interest on that loan for the first year ($320), was paid by Stokley to Davis on February 9, 1937. Nor could they, the court stated, be payments of principal on the $4,000 loan, since in March and April, 1937, Stokley sent Davis two checks of $500 each, marked as the first and second payments on the property which secured the $4,000 loan. Other circumstances, the court found, corroborated the conclusion that these payments were actually interest on the Kaufman loan but paid to Davis. A statement prepared by Stokley's son showed a payment of $400 to Davis on one-half year's interest on the $10,000 loan on February 28, 1938, but this item was omitted from a subsequent statement concerning the same period, prepared by Stokley for submission to the Grand Jury. In addition, the stub of this check in the Stokley checkbook had been completely torn out and destroyed, apparently to conceal this payment to

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as security. Davis never repaid the $4,000 to Ungerleider. (Op. 30-31.)

In the spring of 1937, Ungerleider also arranged a composition with the banks to which Davis owed $85,000, for the sum of $37,674.50, and advanced the money to put it into effect. Davis gave notes for the loan and assigned certain life insurance policies to Ungerleider. Although Ungerleider has recovered certain sums, a balance of $17,000 has never been repaid. (Op. 30.)

Davis. Furthermore, Kaufman falsely testified during the Davis investigation that in July, 1936, he received a $200 payment from Stokley on the $10,000 loan, and although Kaufman further testified that he deposited the check in a certain bank, the bank's officers testified that no such deposit had in fact been made. In this proceeding Kaufman claimed he had no recollection of the deposit of the check. (Op. 31-32.)

This evidence again is ample to support the court's finding that "there can be no reasonable doubt, especially when the timing of the loan is considered, coming as it did immediately after the receipt by Kaufman from Universal of the sum of $25,000, that the $10,000 loan was designed to provide an indirect means for the payment from Kaufman to Davis, and a false front behind which the true nature of the payment was concealed" (Op. 33).[28]

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[28] Also pertinent on this phase of the case, is the illicit combination between Davis and Kaufman in regard to the so-called Fox transactions which the court below describes in detail (Op. 33-39). William Fox, the movie magnate, confessed to his part in this conspiracy, and pleaded guilty thereto (Op. 36).

CONCLUSION

The court below had jurisdiction to proceed as it did in these cases, and its findings are supported by ample evidence. The petition for writs of certiorari should therefore be denied.

Respectfully submitted.

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